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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MAXXANAYA HUGHIE,

Defendant and Appellant.

F077512

(Super. Ct. No. VCF354885)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Brett R. Alldredge, Judge.

Lindsay Sweet, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Amanda D. Cary and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Franson, Acting P.J., Smith, J. and Snauffer, J.

INTRODUCTION

Appellant Maxxanaya Hughie contends that the trial court abused its discretion by ordering him to pay $900 in restitution for a laptop computer, stolen during a school burglary, that school officials reported stolen on August 13, 2017. He contends that the burglary he admitted occurred on August 14, 2017, so he is not responsible for providing restitution for that laptop. We hold that his admitted crime was not limited to August 14th and the court properly ordered restitution for the laptop because it was a loss incurred as a result of the crime for which he was convicted.

STATEMENT OF THE CASE

A complaint filed August 17, 2017[1] charged Hughie with committing a burglary on or about August 14. (Pen. Code, § 459; count 1).[2] He was arraigned and entered a not guilty plea. On October 16, Hughie entered a no contest plea to the charge based on the court's indicated sentence of two years pursuant to section 1170, subdivision (h), with Hughie to serve one year in custody and one year on mandatory supervision.

On November 21, the court ordered Hughie to serve two years in custody, with one year suspended and that time to be served on mandatory supervision. As a condition of mandatory supervision, restitution to the victim remained open. The court awarded Hughie a total of 197 days of presentence custody credits.

On March 21, 2018, a restitution hearing was held and the court ordered Hughie to pay the victim $1,025 in restitution.

On May 15, 2018, Hughie filed a notice of appeal.[3]

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[1] References to dates are to date in 2017 unless otherwise stated.

[2] Undesignated statutory references are to the Penal Code.

[3] Hughie subsequently violated the terms of his mandatory supervision and the court ordered him to serve the remainder of his previously imposed sentence.

STATEMENT OF FACTS[4]

Reports of the Visalia Police Department indicate between August 1, 2017 and August 14, 2017, the Divisadero Middle School was burglarized multiple times. On August 11, 2017, officers were dispatched to Divisadero Middle School and upon arrival, contacted the assistant principal, J.S., who advised several items were stolen from the girl's locker room within the past week. J.S. stated he would create a list of all the missing items and provide officers with a copy at a later date.

On August 14, 2017, officers were re-contacted by employees of the middle school who reported the school was burglarized again and the suspect appeared to have been sleeping in the PE room. Officers viewed the surveillance video from August 13, 2017, and observed the suspect enter an open utility room in the main hallway and remove a BMX bicycle. The surveillance video also shows the suspect entering the girl's locker room. Officers captured two still photos of the suspect and issued a be on the lookout for the suspect. Assisting officers identified the suspect as [Hughie] and advised he has a history of committing burglaries.

J.S. provided officers with a list of all the missing items and their approximate values, which included: two Hewlett Packard laptops valued at approximately $900 each, two Nexus tablets valued at approximately $400 each, a Canon Power-Shot digital camera worth approximately $125, an Ion-Explorer portable speaker/PA system worth approximately $200, and $380 in United States currency, for an approximate total of $3,300.

On August 15, 2017, officers located [Hughie] and detained him without further incident. A records check revealed [Hughie] was on active felony probation for burglary. [He] was transported to the police department for questioning. During questioning, [he] informed officers he found the bicycle next to a trash can, and shortly thereafter requested to speak with a lawyer and the interview was terminated.

[Hughie] was transported and booked into the Adult Pre-Trial Facility.

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4 Since Hughie admitted the charge, there is no preliminary hearing or trial transcript. The facts are quoted from the probation officer's report.

DISCUSSION

I. THE TRIAL COURT'S RESTITUTION ORDER WAS NOT AN ABUSE OF DISCRETION

Hughie contends the trial court abused its discretion by ordering him to pay $900 in restitution for a laptop that school officials reported stolen on August 13. He contends that the crime he admitted occurred on August 14, so he is not responsible for providing restitution on that item. Respondent submits that Hughie's admitted burglary was not limited to August 14th and the court properly ordered restitution for the laptop because it was a loss incurred as a result of the crime of which Hughie was convicted.

A. Relevant Record

1. Hughie's No Contest Plea

The complaint charged Hughie with one count of committing a burglary of a school building "on or about" August 14. On October 16, Hughie's case was resolved. He agreed to "enter a plea of no contest to Count 1 based on the Court's indicated sentence" of two years pursuant to section 1170, subdivision (h), and to serve one year in custody and one year on mandatory supervision. The parties stipulated to a factual basis for his plea. At the change of plea hearing, the court told Hughie he was "charged on the 14th of August, 2017, with the crime of burglary from a school building . . . ." The court asked Hughie how he pled and he replied, "No contest."

2. Restitution Hearing and Court Order

On March 21, 2018, the matter came before the court for a restitution hearing. The parties agreed that Hughie owed the school restitution of $125 for a camera, but disputed that Hughie owed $900 for a laptop taken "between the period of time on a Saturday [August 12] or Sunday [August 13]." The court inquired of Hughie's counsel if he wished to offer evidence or argument as to why Hughie should not be ordered to pay restitution for the laptop.

[Defense Counsel]: We had a discussion . . . off the record about the basic facts that I think apply to this discussion. Officer Brumley had reported that when he spoke to a teacher, Miss Eddy, she told him that she came in to work on Sunday, August 13th, like 11:00 in the morning or so, and that that's when she discovered that that laptop was missing. So, in other words, the laptop was gone as of Sunday. That had to have disappeared prior to Sunday.

The Court: And when did they have video showing [Hughie] was on the premises?

[Defense Counsel]: . . . [T]he video showed [Hughie] in that area overnight Saturday, the 12th, into Sunday, the 13th, so in the area of that office.

The Court: Okay.

[Prosecutor]: I believe also Sunday into Monday.

[Defense Counsel]: Right. . . . And then [Hughie] was also seen on surveillance late Sunday into the early morning of Monday, the 14th. . . . And so my objection – so in this case, . . . [Hughie] was charged by Felony Complaint with one count of second degree burglary, that was from August 14th. There was a change of plea on August 16th [*sic*]. The People had made no offer. He pled no contest to the one and only count of second degree burglary on August 14th.

Defense counsel argued Hughie was not responsible for restitution for losses not caused by the criminal conduct for which he sustained a conviction. Hughie "sustained a conviction for criminal conduct of second degree burglary on August 14th. The laptop could not have been stolen by him on August 14th." Counsel asserted the laptop had to have been taken at least as early as "11 a.m. on Sunday [the 13th] and perhaps earlier than that." Relying on section 1202.4,[5] he asserted Hughie should pay restitution only for property that went missing on August 14th, the date pled and proven in this case.

[5] In part, section 1202.4 provides: "It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime." . . . [This] restitution order . . . "shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct." (*Id.*, subd. (f)(3).) In addition, "the court shall order full

The prosecutor responded that Hughie did not plead to a charge that states "on and only on August 14th did he commit a second degree burglary;" the charge "says on or about August 14th." He contended that the laptop discovered missing on August 13th "falls under the umbrella of on or about August 14th."

The prosecutor continued:

> It's not necessarily clear that the items were taken in two different instances. They were discovered missing on two different days, but they still could have been taken at the same time. And even if they weren't taken in the same instance, if the one discovered on August 13th was, in fact, taken during that window of August 12th to August 13th in the morning, and the one discovered on August 14th was taken in the window of August 13th, August 14th in the morning, I think both of those would still be falling under the umbrella of on or about August 14th.
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> Had this case gone to trial, and there was no August 14th discovery, there was only the August 13th discovery, I think that a jury still would have been entitled to conclude that the item stolen on August 13th, assuming it was proven at trial that it was stolen by [Hughie], that item would meet the requirements to fall under the Complaint the People have filed.

The court agreed with the prosecutor's position:

> I believe that the position of the prosecutor is the only reasonable one. The Complaint clearly says on or about August 14, 2017. If I were to adopt the rationale of the defense, that it would be a jurisdictional issue as to whether or not a piece of property was thieved at 11:58 on one night before or 12:02 in the morning, four minutes later, and I don't believe that is an appropriate distinction. The property was reported to be missing on the 13th.
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> There is a plethora of evidence, including, but not limited to, the fact that they see [Hughie] on the property on or about that date . . . .
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> If this case was – somehow turns on the principle that the People have to prove it's taken within a certain five-minute window, a ten-minute

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restitution (*id.*, subd. (f)) "unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record." (*Id.*, subd. (b).)

window, or even a 24-hour window, but I'm not aware of any evidence or any case that makes that distinction. That's how they're pled.

There was never argument made in this case at the time the plea was taken, for example, that [Hughie] is admitting that he committed the crime only on the 14th of August. I suspect if you look at the transcript, although I don't have it, I read it right off the Complaint, and that's why it's pled that way.

Defense counsel pointed out that at the time of the plea, the court stated Hughie was " 'charged on the 14th of August, 2017, with the crime of burglary . . . .' " The prosecutor argued that did not change his position because defense counsel and Hughie were aware of what the complaint charged Hughie with – both had a copy of the complaint. Defense counsel continued to insist that because the laptop was found missing on August 13th, Hughie could not have stolen it on August 14th so he did not owe restitution for the laptop.

The trial court ruled as follows:

The Court: I carefully considered the arguments of counsel. I believe that the only reasonable, fair, and equitable interpretation of the issue in dispute, certainly given the fact that we're talking about a day's difference, it was pled on or about, [Hughie] was advised of what that charge was at the time he was arraigned. I believe the People are entitled to request restitution for the item in question that was reported missing on Sunday, as well as the one that was missing on Monday. So the restitution order in this case is going to be entered in the total amount of?

[Prosecutor]: $1,025.

The Court: So ordered.

[Defense Counsel]: Thank you, Your Honor.

The Court: Thank you, sir.

B. Relevant Legal Principles

The California Constitution provides:

It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have

> the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. (Cal. Const., art. I, § 28, subd. (b)(13)(A).)

This constitutional mandate is codified in section 1202.4, which "authorizes trial courts to order direct victim restitution for those losses incurred as a result of the crime of which the defendant was convicted." (*People v. Martinez* (2017) 2 Cal.5th 1093, 1101 (*Martinez*).) Section 1202.4 states that, subject to exceptions not pertinent here,

> in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order . . . . (*Id*., subd. (f).)

The restitution order shall, to the extent possible, fully reimburse the victim for every determined economic loss "incurred as the result of the defendant's criminal conduct." (§ 1202.4, subd. (f)(3); *Martinez*, *supra*, 2 Cal.5th at p. 1101.) Thus, section 1202.4 victim restitution is limited to losses caused by the criminal conduct for which the defendant sustained the conviction. (*People v. Rahbari* (2014) 232 Cal.App.4th 185, 190 (*Rahbari*); *People v. Woods* (2008) 161 Cal.App.4th 1045, 1050.)[6]

This Court reviews a restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) A restitution order based on a demonstrable error of law constitutes an abuse of the trial court's discretion. (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49.)

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[6] A split sentence, as here, to time in county jail followed by mandatory supervision pursuant to section 1170, subdivision (h), is equivalent to a prison sentence subject to the mandatory restitution requirements of section 1202.4 rather than discretionary restitution ordered as a condition of a probation under section 1203.1. (*Rahbari, supra,* 232 Cal.App.4th at p. 190.)

C. Hughie Was Properly Ordered to Make Restitution for the Laptop

Hughie contends that the trial court erred by ordering him to pay restitution for the laptop because he pled to an offense occurring on August 14th and the laptop was reported missing on August 13th. Respondent disagrees.

Initially, respondent notes that at the restitution hearing it appears that the parties relied upon a report from "Officer Brumley" regarding "Miss Eddy[']s" reporting the laptop missing on August 13.[7] It is the appellant's responsibility to include in the appellate record all the record relevant to his issues on appeal. (See *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125.) Hughie has not made Officer Brumley's report part of the record on appeal. "Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

In any event, Hughie's claim fails because the available record demonstrates he pled to the offense as charged and that charge included the period when the laptop was taken.

The August 17 complaint charged Hughie with one count of committing a burglary of a school building "on or about" August 14. He was arraigned on that charge. The "on or about" language in the charge plainly meant that he committed the offense on August 14, or on a date reasonably close to that date. (See *United States v. Champion* (11th Cir. 1987) 813 F.2d 1154, 1168 ["When the prosecution uses the 'on or about' designation, proof of a date reasonably near to the specified date is sufficient."]; *United States v. Leibowitz* (7th Cir. 1988) 857 F.2d 373, 379 ["The courts agree that when the indictment uses the 'on or about' designation, proof of a date reasonably near to the

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[7] It also appears that briefing on this issue may have been submitted to the court as the court set dates for points and authorities to be filed by the People and a response from the defense. In addition, the parties viewed video of Hughie's offenses. None of these items were made part of the record on appeal.

specified date is sufficient."]; *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304 ["CALCRIM No. 207 accurately states the general rule that when a crime is alleged to have occurred 'on or about' a certain date, it is not necessary for the prosecution to prove the offense was committed on that precise date, but only that it happened reasonably close to that date."].) Clearly, August 12-13 was reasonably close to August 14. Thus, the charge included that period for purposes of a no contest plea.

At the change of plea hearing, Hughie's counsel specifically stated Hughie agreed to "enter a plea of no contest *to Count 1* [the only count] based on the Court's [then] indicated sentence." (Italics added.) Neither the court nor prosecutor promised to amend the count by deleting the "on or about" language or modifying the count in any other fashion. Under these circumstances, Hughie pled no contest to count one.

Further, the record demonstrates that Hughie was observed during his burglary of the school on August 13. (See *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048 [" '[T]he trial court is entitled to consider the probation report when determining the amount of restitution.' "].) Indeed, at the restitution hearing Hughie conceded that video evidence revealed he was "in [the area of the burglarized office] overnight Saturday, the 12th, into Sunday, the 13th" and even "into the early morning of Monday, the 14th." This further supports the trial court's implicit finding that he was responsible for the school's loss of the laptop on a date near August 14th.

Nevertheless, Hughie argues that the court abused its discretion by ordering him to pay restitution for the laptop. He seizes upon the court's statement to him at the change of plea hearing, that he was "charged on the 14th of August, 2017, with the crime of burglary from a school building . . .;" and then he pled no contest to the charge. The court arguably misstated the charge by leaving out the language "on or about" when referencing the date. Hughie asserts by virtue of the misstatement the laptop loss therefore occurred "outside the time period of the crime of conviction . . ." because it was reported stolen on August 13th and he pled to an offense that occurred on August 14th.

This attempt to take advantage of the court's plainly inadvertent misstatement of the offense date elevates form over substance and must fail. (See *People v. Sandoval* (2006) 140 Cal.App.4th 111, 132 [defects in a plea's form are not grounds for reversal in the absence of prejudice to the defendant]; cf. *People v. Rivers* (1961) 188 Cal.App.2d 189, 195 ["The defect was merely one of artificiality rather than substance. The judgment rendered was from the verdict which found the defendant guilty of a felony as charged in the information"]; *United States v. Samuels* (6th Cir. 2002) 308 F.3d 662, 668, fn. 1 [amending judgment to be consistent with the indictment language which was presented to the jury and on which the conviction was based].)

While the court misstated the offense date by leaving out the "on or about" language when it relayed the charge to Hughie at the change of plea hearing, the parties and court obviously intended for him to plead no contest to count 1 – which the parties knew included the "on or about" language. (See *People v. Schultz* (1965) 238 Cal.App.2d 804, 808 ["The distinction between clerical error and judicial error is that the former is inadvertently made while the latter is made advertently as the result of the exercise of judgment."]) Again, neither the court nor the prosecutor promised to or did amend count 1; nor does Hughie claim otherwise. Thus, Hughie understood he was admitting the burglary as charged, with the "on or about" language, which, as shown, included the August 12-13 offense date(s). (See *People v. Mosby* (2004) 33 Cal.4th 353, 365 [a review of the entire record sheds light on appellant's understanding.])

Accordingly, restitution for the laptop clearly came within the " 'scope of victim restitution [for] losses caused by the criminal conduct for which [the defendant] sustained the conviction.' " (*Rahbari, supra*, 232 Cal.App.4th at p. 190; contrast e.g., *People v. Lai* (2006) 138 Cal.App.4th 1227, 1246, 1249 [restitution order attributable to fraudulently obtained aid before the charge and verdict form indicated period held invalid].)

The order requiring restitution for the laptop under section 1202.4 is, therefore, appropriate here.

DISPOSITION

The judgment is affirmed.